



October 17, 2016

**BY ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: NOTICE OF EX PARTE**

**WC Docket No. 16-143:** *Business Data Services in an Internet Protocol Environment*

**WC Docket No. 15-247:** *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*

**WC Docket No. 05-25:** *Special Access for Price Cap Local Exchange Carriers*

**RM-10593:** *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*

Dear Ms. Dortch:

On October 13, Steven K. Berry, President & CEO of CCA, Elizabeth Barket, Law & Regulatory Counsel for CCA, John Nakahata of Harris, Wiltshire & Grannis, representing CCA, and I met with Commissioner Clyburn and Claude Aiken, Legal Advisor to Commissioner Clyburn, and separately with Nick Degani, Legal Advisor to Commissioner Pai, as well as Julia Palermo and Alexandra McLeod, Legal Interns with Commission Pai's Office, to discuss the above-captioned docket. On October 14, we met with Commissioner O'Rielly and Amy Bender, Legal Advisor to Commissioner O'Rielly, to discuss the same proceeding.

CCA acknowledged our disappointment that the circulated Business Data Services ("BDS") item, as described in the Fact Sheet,<sup>1</sup> does not address Ethernet other than through a complaint process that lacks guidance on how to evaluate unjust and unreasonable or unreasonably discriminatory conduct. As stated in comments, reply comments, study by Dr. Katz and subsequent filings,<sup>2</sup> ensuring competitive carriers have access to Ethernet BDS for backhaul at just and

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<sup>1</sup> Federal Communications Commission, *Chairman Wheeler's Proposal To Promote Fairness, Competition, And Investment In The Business Data Services Market* (rel. Oct. 7 2016), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db1007/DOC-341659A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1007/DOC-341659A1.pdf) ("Fact Sheet").

<sup>2</sup> See Comments of Competitive Carriers Association, WC Docket Nos. 05-25, 15-247, 16-143 (filed June 28, 2016) ("CCA Comments"); Reply Comments of Competitive Carriers Association, WC Docket Nos. 05-25, 15-247, 16-143 (filed Aug. 9, 2016) ("CCA Reply Comments"); *Ex Parte* Letter from Steven K. Berry, President & CEO, CCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-25, 15-247, 16-143 (filed Aug. 3, 2016); *Ex Parte* Letter from Rebecca Murphy Thompson, EVP & General Counsel, CCA, to

reasonable rates, uninhibited by undue exercise of market power, is critical to migrating *all* carriers and consumers to next generation technology and especially 5G.

Nevertheless, with relatively minor changes to the item, the Commission can still provide some more significant relief for competitive wireless carriers. Specifically, to ensure carriers can transition to next generation technologies, the Commission should: (1) adopt a presumption that the Ethernet market, in addition to TDM, at 50 Mbps and below is not competitive for short-term relief; (2) seek comment in its Further Noticed of Proposed Rulemaking (“FNPRM”) on CCA’s proposals for high-capacity BDS that establishes a competitive market test based on census blocks and actual connections to identify areas where competition is not adequately disciplining high capacity Ethernet prices and remedies to establish just and reasonable rates in these uncompetitive areas; and, (3) improve the complaint process by establishing clear rules rather than soft guidelines and an expedited timeframe for resolution. These small changes to the currently-circulated BDS item will support faster deployment of innovative 5G mobile service.

Based on the current state of the BDS item, CCA urged in its recent meetings to promptly adopt a presumption that the market for “low-capacity” BDS at 50 Mbps and below—whether provided over TDM or Ethernet—is uncompetitive.<sup>3</sup> While not a long-term solution for 5G, many competitive carriers still need TDM and low-capacity Ethernet at just and reasonable rates to support their 2G, 3G and 4G networks.<sup>4</sup> The data on record sufficiently supports adopting this presumption pending further review in the FNPRM. This would help to provide relief to competitive carriers still employing low-capacity BDS.

Further, CCA stated that the FNPRM should pave the way for a long-term Ethernet pricing remedy solution to “future-proof” this proceeding. The Commission should seek comment on specific proposals and precise remedies including benchmarks or price caps for BDS above 50 Mbps, in light of continued growth of wireless bandwidth needs and to what extent new technologies and new entrants can help to constrain market power. For example, CCA’s proposal for a competitive market test based on actual connections in a census block (or adjacent census block) should be considered as part of the FNPRM.<sup>5</sup>

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Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-25, 15-247, 16-143 (filed Aug. 5, 2016); *Ex Parte* Letter from Rebecca Murphy Thompson, EVP & General Counsel, CCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-25, 15-247, 16-143 (filed Sep. 9, 2016); *see also* Raul Katz, *Assessment of the Impact of the Business Data Services Market Dynamics on Innovation and Competition in the U.S. Wireless Market*, TELECOM ADVISORY SERVICES, LLC, (July 2016), attached as Exhibit 1 (“Katz Study”).

<sup>3</sup> *Business Data Services in an Internet Protocol Environment, et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Red 4723, 4830, 4832, 4840 ¶ 271 (2016) (“[T]he data and our analysis suggests that competition is lacking in BDS at or below 50 Mbps in many circumstances...”).

<sup>4</sup> Many competitive carriers still use traditional TDM—chiefly DS1s and DS3s—for wireless backhaul, especially in rural areas where high-capacity Ethernet is not available. CCA Comments at 3.

<sup>5</sup> *See* CCA Reply Comments at 20-24.

Beyond the FNPRM, the CCA urged the Commission make more useful the Section 208 complaint adjudication process by establishing stronger, clearer rules and a framework for more expedited review and conclusion of complaints. Providing greater certainty through more predictable adjudicatory principles will increase the utility of the BDS complaint program, encourage stakeholders to utilize the process, and make it easier for the Commission to handle many cases in a timely fashion. Particularly, CCA suggested the following:

- BDS providers should not be allowed to discriminate against wireless carrier customers. It should be a *per se* violation of Sections 201(b) and 202(a) to (1) charge wireless carriers more for BDS used for wireless services than BDS used for wireline services, or (2) exclude wireless carriers entirely from being able to purchase BDS on the same terms and conditions available to wireline carriers or end users.
- The FCC should adopt a rule, rather than a presumption, that wholesale BDS service rates should be lower than retail rates. Failing to adhere to this rule also should be deemed a *per se* violation of Sections 201(b) and 202(a).
- Instead of triggering “greater scrutiny,” the Commission should presume BDS rates—whether TDM or Ethernet—are not competitive where there is “evidence that given rates are materially higher than those charged by the same provider for the same circuit in nearby buildings” or “evidence of rates for low-bandwidth Ethernet service that are materially higher than rates for the nearest-bandwidth TDM rates.”<sup>6</sup> It is appropriate to shift the burden of proof to the BDS provider offering this critical input at uneven rates.

Similarly, to speed the complaint process, the Commission should establish firm timelines for the pre-complaint, staff-supervised mediation process, as well as timelines for important milestones within the complaint process. For example, the FCC should adopt submission deadlines for relevant pricing data. Further, the FCC should not require use of the entire mediation period if progress is not being made or if the deciding issues are legal rather than factual. CCA noted it supports a 20-day pre-complaint mediation process. At least, the Commission should clearly establish that the FCC must stay within the current 5-month timeframe for a Section 208 dispute when regulating BDS.<sup>7</sup>

CCA expressed its appreciation for the Commission finally acting on BDS reform and with CCA’s proposed changes, the BDS item can help speed next generation wireless deployments in the short-term and 5G deployments in the long-term.

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<sup>6</sup> Fact Sheet at 2.

<sup>7</sup> See 47 U.S. Code § 208(b)(1).

This letter is being filed electronically, in accordance with Section 1.1206(b), for inclusion in the record in the above-referenced proceedings.

Respectfully submitted,

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